

1986

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### Recommended Citation

Hedwig M. Auletta, *Including Limited Partners in the Diversity Jurisdiction Analysis*, 54 Fordham L. Rev. 607 (1986).

Available at: <https://ir.lawnet.fordham.edu/flr/vol54/iss4/12>

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# INCLUDING LIMITED PARTNERS IN THE DIVERSITY JURISDICTION ANALYSIS

## INTRODUCTION

The Judiciary Act of 1789<sup>1</sup> conferred on the lower federal courts “original cognizance”<sup>2</sup> of civil suits between “a citizen of the State where the suit is brought, and a citizen of another State.”<sup>3</sup> Diversity jurisdiction had been a controversial issue at the time of the ratification debates.<sup>4</sup> Beginning with the earliest decisions involving diversity jurisdiction, the Supreme Court has construed the statutory grant narrowly. For example, in 1806 the Supreme Court in *Strawbridge v. Curtiss*<sup>5</sup> interpreted the Judiciary Act to require complete diversity—the citizenship of each plaintiff must differ from that of each defendant.<sup>6</sup> Subsequently, in *Chap-*

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1. Ch. 20, 1 Stat. 73 (codified as amended in scattered sections of 28 U.S.C.) [hereinafter cited as the Judiciary Act].

2. Judiciary Act, ch. 20, § 11, 1 Stat. 73, 78 (1789) (current version at 28 U.S.C. § 1332(a) (1982)).

3. *Id.* Only the Supreme Court was established and vested with jurisdiction by the Constitution, subject to exceptions that Congress shall make. U.S. Const. art. III, § 1. It was left to Congress to decide what inferior federal courts, if any, should be established, and within the limits of Article III, § 2, what jurisdiction should be conferred on them. *Id.*

4. See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 18 (2d ed. 1973) (diversity jurisdiction issue aroused “bitter controversy” during the ratification debates) [hereinafter cited as Hart & Wechsler]. In the late eighteenth century, the state constitutional conventions and the press launched their most vigorous assault on the sections of the Constitution dealing with the federal judiciary, including the subject of diversity jurisdiction. Note, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 487-88 (1928) (student note of Judge Henry Friendly). The Anti-Federalists feared that granting jurisdiction to the federal courts would necessarily subtract from the authority of the state courts. *Id.* at 488. Patrick Henry assailed diversity as the “annihilat[ion]” of the state courts. *Id.* at 489 (citing 2 Elliot's Debates on the Federal Constitution 397 (J. Elliot rev. ed. 1828)). Others were concerned with whether state or federal law would apply, and feared that if federal courts would not be required to apply local law, the states would have to bow to congressional legislation. *Id.* at 490. Finally, the expense of maintaining or defending a suit in a distant federal forum most disturbed diversity's opponents. *Id.* at 490-91. In spite of these protests, and a lack of any satisfactory response by the proponents of diversity, the Federalist view prevailed. *Id.* at 486-87.

The debate resumed in the first half of this century, and continues to the present day. See *infra* note 147 and accompanying text. Recently proposed legislation to abolish or reform diversity jurisdiction includes H.R. 3689, 98th Cong., 1st Sess., 129 Cong. Rec. H5918 (1983); H.R. 3690, 98th Cong., 1st Sess., 129 Cong. Rec. H5918 (1983); H.R. 3691, 98th Cong., 1st Sess., 129 Cong. Rec. H5918 (1983); H.R. 3692, 98th Cong., 1st Sess., 129 Cong. Rec. H5918-19 (1983); H.R. 3693, 98th Cong., 1st Sess., 129 Cong. Rec. H5919 (1983).

5. 7 U.S. (3 Cranch) 267 (1806).

6. See *id.* at 267. Although neither the *Strawbridge* opinion nor article III uses the term “complete diversity,” it has, as a general rule, been interpreted as requiring diversity between each plaintiff and each defendant. See *Camp v. Gress*, 250 U.S. 308, 312 (1919); Hart & Wechsler, *supra* note 4, at 1064. Because the *Strawbridge* Court was not interpreting article III, but only the Judiciary Act, it did not hold that the Constitution requires complete diversity. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-

*man v. Barney*<sup>7</sup> and *Great Southern Fire Proof Hotel Co. v. Jones*,<sup>8</sup> the Supreme Court further narrowed the potential for diversity jurisdiction by holding that the citizenship of all persons composing an unincorporated association must be considered in determining whether the requirement of complete diversity is satisfied.<sup>9</sup> This holding has been referred to as the "persons composing" rule.<sup>10</sup>

The complete diversity rule has occasionally proved difficult to apply.<sup>11</sup> Nevertheless, the Supreme Court, despite ample opportunity, has not deviated from the general requirement of complete diversity between all persons composing an unincorporated association and the opponent.<sup>12</sup> Despite the rule's longevity and practical benefits,<sup>13</sup> some lower courts have strayed from it when confronted with the limited partnership as a party.<sup>14</sup> These courts hold that only the citizenship of general partners is relevant in determining whether complete diversity exists.<sup>15</sup> They appar-

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31 (1967). Indeed, Congress has made statutory exceptions to complete diversity, as in the case of statutory interpleader, which requires diversity between only one plaintiff and one defendant. See 28 U.S.C. § 1335 (1982). "Minimal diversity" is expressly authorized when there are rival claimants to a single fund. This allows a stakeholder to bring all claimants together in one action. *Id.*

Rule 23 of the Federal Rules of Civil Procedure (Rules) also permits an escape from the demands of complete diversity. If the party is deemed an appropriate class, only the citizenship of its named representatives will be considered, even though other members of the class may be of such citizenship as would defeat diversity. C. Wright, *The Law of Federal Courts* 484 (1983).

In the case of ancillary jurisdiction, federal courts may decide a controversy without reference to the citizenship of the ancillary parties, although neither the Constitution nor the statutes confers such jurisdiction. *Id.* at 28. Ancillary jurisdiction embraces an entirety concept—a federal district court that has acquired jurisdiction over a principal matter also possesses jurisdiction over other matters raised by the case. *Id.*

The above situations are narrow exceptions only, and do not defeat the general rule of complete diversity established in *Strawbridge*. *Id.* at 142.

7. 129 U.S. 677 (1889).

8. 177 U.S. 449 (1900).

9. See *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456 (1900) (include citizenship of the "several persons composing" partnership association for diversity inquiry); *Chapman v. Barney*, 129 U.S. 677, 682 (1889) (determine citizenship of "all the members" before deciding diversity question).

10. See, e.g., *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436, 438 (7th Cir. 1984); Note, *Who Are the Real Parties in Interest for Purposes of Determining Diversity Jurisdiction for Limited Partnerships?*, 61 Wash. U.L.Q. 1051, 1057 (1984) [hereinafter cited as *Real Parties*].

11. For example, in *Marshall v. Baltimore & O.R.R.*, 57 U.S. (16 How.) 314 (1853), the Court struggled with the question of how to apply the complete diversity requirement to a corporation. Without gainsaying the complete diversity requirement, the Court created a fiction whereby each shareholder of a corporation was deemed a citizen of the state of incorporation. See *id.* at 327-29.

12. See *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 149-53 (1965); *Thomas v. Board of Trustees*, 195 U.S. 207, 211-13 (1904). See also *supra* note 6.

13. See *supra* notes 7-9, 147-52.

14. See, e.g., *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183-84 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966); *Wroblewski v. Brucher*, 550 F. Supp. 742, 748 (W.D. Okla. 1982); *Williams v. Sheraton Inns, Inc.*, 514 F. Supp. 22, 22 (E.D. Tenn. 1980).

15. See *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183-84 (2d Cir.), *cert.*

ently rely on a capacity to sue or a real party in interest inquiry<sup>16</sup> that examines state law to determine which persons should be deemed to compose the limited partnership.

Although these courts represent only a minority,<sup>17</sup> numerous legal commentators have endorsed their approach, or at least their result.<sup>18</sup> Most commentators criticize the "traditional" inquiry,<sup>19</sup> which includes

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*denied*, 385 U.S. 817 (1966); Sixth Geostatic Energy Drilling Program 1980 v. Ancor Exploration Co., 544 F. Supp. 297, 299-305 (N.D. Okla. 1982); Wroblewski v. Brucher, 550 F. Supp. 742, 748 (W.D. Okla. 1982); Williams v. Sheraton Inns, Inc., 514 F. Supp. 22, 22 (E.D. Tenn. 1980).

16. Although *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966), is the seminal case, it offered little justification for disregarding limited partners. *Colonial* itself does not use the words, "real party in interest" or "capacity to sue," but courts and commentators have assumed that Judge Friendly relied on one or the other of these concepts. See, e.g., *Grynberg v. B.B.L. Assocs.*, 436 F. Supp. 564, 566-67 (D. Colo. 1977); Note, *Limited Partnership Treated as Aggregate for Diversity Purposes*, 9 Seton Hall L. Rev. 304, 320-22 (1978) [hereinafter cited as *Aggregate Treatment*]; 46 Geo. Wash. L. Rev. 657, 662 (1978).

17. Compare *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183-84 (2d Cir.) (since limited partner not a proper party to proceedings, his citizenship cannot destroy diversity), *cert. denied*, 385 U.S. 817 (1966), *Sixth Geostatic Energy Drilling Program 1980 v. Ancor Exploration Co.*, 544 F. Supp. 297, 302 (N.D. Okla. 1982) (better reasoned analysis counts only general partners for diversity), *Wroblewski v. Brucher*, 550 F. Supp. 742, 748 (W.D. Okla. 1982) (state law deems only general partners proper parties) and *Williams v. Sheraton Inns, Inc.*, 514 F. Supp. 22, 22 (E.D. Tenn. 1980) (following *Colonial*, excludes limited partners) with *New York State Teachers Retirement Sys. v. Kalkus*, 764 F.2d 1015, 1019 (4th Cir. 1985) (citizenship of a limited partner can destroy diversity), *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436, 439 (7th Cir. 1984) (same), *Trent Realty Assoc. v. First Fed. Sav. & Loan Ass'n*, 657 F.2d 29, 32 (3d Cir. 1981) (same), *Windward City Center v. Transamerica Occidental Life Ins. Co.*, 613 F. Supp. 1216, 1219 (D. Hawaii 1985) (same), *Conroy v. Winn*, 581 F. Supp. 1280, 1281 (D.D.C. 1984) (same), *Hereth v. Jones*, 544 F. Supp. 111, 117 (E.D. Va. 1982) (same) and *Grynberg v. B.B.L. Assocs.*, 436 F. Supp. 564, 568 (D. Colo. 1977) (same).

18. See, e.g., Comment, *Diversity Jurisdiction Over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule*, 56 Tex. L. Rev. 243, 251 (1978) (real party in interest should determine citizenship of an unincorporated association) [hereinafter cited as *Business Entities*]; Comment, *Limited Partnerships and Federal Diversity Jurisdiction*, 45 U. Chi. L. Rev. 384, 402-04 (1978) (same) [hereinafter cited as *Limited Partnerships*]; *Real Parties*, *supra* note 10, at 1065 (real party in interest should determine citizenship of limited partnerships); 16 Duq. L. Rev. 221, 232 (1977-78) (all general partners with capacity to sue asserting representative status counted for diversity); 46 Geo. Wash. L. Rev. 657, 671 (1978) (count only general partners for diversity).

19. See, e.g., Comment, *Diversity Jurisdiction and Limited Partnerships*, 1977 B.Y.U. L. Rev. 661, 668 (refusal to follow state capacity law "ill-founded") [hereinafter cited as *Diversity Jurisdiction*]; Note, *Carlsberg Resources Corp. v. Cambria Savings & Loan Association: Diversity Jurisdiction and the Limited Partner*, 1978 Det. C.L. Rev. 177, 190 (1978) (should not treat general and limited partners alike) [hereinafter cited as *Diversity*]; Note, *Carlsberg Resources Corp. v. Cambria Saving and Loan Association: Limited Partners and Diversity Jurisdiction*, 13 Tulsa L.J. 304, 311 (1977) (traditional treatment may not be appropriate for limited partnerships) [hereinafter cited as *Limited Partners and Diversity*]; Comment, *The Citizenship of Limited Partners for Purposes of Federal Diversity Jurisdiction*, 47 U. Cin. L. Rev. 301, 304-05 (1978) (*Colonial*, which refused to apply the traditional rule, reached correct result); 27 Emory L.J. 165, 174 (1978) (counting limited partners is "harsh" and "illogical").

the citizenship of each partner, general and limited.<sup>20</sup> Some writers argue that limited partners should be excluded because "fairness" to the limited partnership as a form of business organization requires an exception to the "persons composing" rule in order to facilitate access to a federal forum.<sup>21</sup> On the other hand, the caseload crisis in the federal courts,<sup>22</sup> coupled with a pervasive belief that diversity jurisdiction has long outlived the original reason for its existence,<sup>23</sup> militates against any manipulation that would increase its scope. Finally, ignoring the citizenship of limited partners plainly conflicts with principles of diversity articulated by the Supreme Court for the last one hundred and eighty years.<sup>24</sup>

This Note begins with an analysis of Supreme Court precedent and contends that the case law requires inclusion of limited partners in a diversity inquiry. It then discusses the real party in interest and capacity to sue rationales advanced to support divergence from complete diversity, and argues that they are inapposite. Moreover, the capacity inquiry does not necessarily lead to exclusion of limited partners.<sup>25</sup> Finally, this Note examines broader policy issues and concludes that the interests of practicality, fairness and judicial economy overwhelmingly favor including limited partners.

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20. See *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436, 439 (7th Cir. 1984) (citing *Chapman* as relevant precedent); *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1258-59 (3d Cir. 1977) (recognizing *Chapman* and *Great Southern* as leading cases).

21. See *Diversity Jurisdiction*, *supra* note 19, at 672 (basic fairness dictates that limited partnerships and corporations be treated alike for citizenship purposes); Comment, *Limited Partnerships in Diversity: The Effect of Rule 17(b) on Federal Jurisdiction*, 6 *Fordham Urb. L.J.* 271, 293 (1978) (limited partnerships' access to federal court should not be inferior to that of any other organization) [hereinafter cited as *Effect of Rule 17(b)*]; *Limited Partners and Diversity*, *supra* note 19, at 315-16 (limited partnership "deprived" unjustly of diversity jurisdiction); 27 *Emory L.J.* 165, 185 (1978) (limited partnerships no less deserving of access to federal court than corporations); 46 *Geo. Wash. L. Rev.* 657, 666 (1978) (persons composing result unnecessarily restricts valuable form of business organization). Justice Fortas agreed with the commentators of his day that the distinction between corporations and unincorporated associations for diversity purposes was artificial and resulted in unfair treatment of the unincorporated association. See *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 149-50 (1965).

22. See *Sheran & Isaacman, State Cases Belong in State Courts*, 12 *Creighton L. Rev.* 1, 46-47 (1978) (overworked federal judiciary spends too much time on diversity cases); *Rubin, An Idea Whose Time Has Gone*, *A.B.A. J.*, June 1984, at 16, 18 (diversity accounts for one-third of all federal trials and one-half of all federal jury days) [hereinafter cited as *Rubin*]. See *infra* note 148 and accompanying text.

Since the *Sheran and Isaacman* article was published, the burden on the federal judges has increased dramatically. In 1978, the number of civil cases filed per authorized federal judgeship was 348; in 1984 it had risen to 508. 1984 Annual Report of the Dir., Admin. Office, U.S. Courts, at 129 Table 16 (1984) [hereinafter cited as *OCA Statistics*].

23. See *infra* note 148 and accompanying text.

24. See *supra* notes 6 and 9, and *infra* text accompanying notes 28-36.

25. See *infra* note 82 and text accompanying *infra* notes 80 and 85.

## I. SUPREME COURT PRECEDENT REQUIRES LITERAL APPLICATION OF THE "PERSONS COMPOSING" RULE

Although the Supreme Court has never decided which members of a modern limited partnership are significant for diversity purposes,<sup>26</sup> one hundred years of precedent supplies an answer. *Chapman v. Barney*<sup>27</sup> made it clear that the rule involving corporate parties would not be extended to a joint stock company, a "mere partnership."<sup>28</sup> While the corporation was then considered, by means of a legal fiction, to have only one citizenship,<sup>29</sup> the *Chapman* Court held that the citizenship of an unincorporated association consists of the citizenship of each of its members.<sup>30</sup> *Great Southern Fire Proof Hotel Co. v. Jones*<sup>31</sup> followed eleven years later and involved an early form of limited partnership organized under the laws of Pennsylvania. Although Pennsylvania considered the partnership an artificial person and a citizen of the state in which it was organized, and although the partnership shared many of the attributes of a corporation,<sup>32</sup> it remained within the scope of *Chapman*.<sup>33</sup> The *Great Southern* Court reaffirmed *Chapman's* recognition of two distinct rules: a long established rule for corporations, which treated them as entities for diversity purposes,<sup>34</sup> and a "persons composing" rule for partnerships and other unincorporated associations.<sup>35</sup>

More than thirty years later, in *Puerto Rico v. Russell & Co.*,<sup>36</sup> a business organization known as a *sociedad en comandita* and considered a "juridical person" in the civil law of Puerto Rico, was deemed a citizen domiciled in Puerto Rico within the meaning of the Organic Act of Puerto Rico.<sup>37</sup> Several lower courts immediately interpreted *Russell* as an

26. See *New York State Teachers Retirement Sys. v. Kalkus*, 764 F.2d 1015, 1017 (4th Cir. 1985); *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1259 (3d Cir. 1977); 4 ALI Resource Materials: Partnerships 129 n.229 (Continuing Education Series 1983) [hereinafter cited as ALI Materials 1983]; 46 Geo. Wash. L. Rev. 657, 660 (1978).

27. 129 U.S. 677 (1889).

28. See *id.* at 682.

29. See *Marshall v. Baltimore & O.R.R.*, 57 U.S. (16 How.) 314, 328 (1853).

30. See *Chapman v. Barney*, 129 U.S. 677, 682 (1889).

31. 177 U.S. 449 (1900).

32. See *id.* at 457.

33. See *id.* at 454.

34. See *id.* at 456.

35. See *id.*

36. 288 U.S. 476 (1933).

37. See *id.* at 482. *Russell* expressly distinguished a juridical entity like the *sociedad* from the limited partnership, and cited *Chapman* and *Great Southern* with approval. See *id.* at 480-81. Comparisons between the limited partnership and the *sociedad* invoke a "false analogy." *Id.* at 481. It must also be noted that the purported basis for federal subject matter jurisdiction in *Russell* was not diversity of citizenship; it was jurisdiction over non-Puerto Rican domiciliaries under the Organic Act. *Id.* at 478. Finding the *sociedad* to be a juridical entity meant that the entity's citizenship, not that of its members, was significant. The *sociedad* was a citizen of Puerto Rico, and therefore it was not entitled to a federal forum under the Organic Act. *Id.* at 478-82.

abandonment of the "persons composing" rule<sup>38</sup> and, based on a broad reading of that decision, began treating unincorporated associations as single entities with a single citizenship.<sup>39</sup> Other courts remained faithful to the traditional analysis.<sup>40</sup> The Supreme Court finally resolved this disagreement in *United Steelworkers v. R.H. Bouligny, Inc.*,<sup>41</sup> which explained that *Russell* had not concerned a diversity of citizenship question.<sup>42</sup> Rather, *Russell* had required the interpretation of a particular federal statute, and the fitting of "an exotic creation of the civil law . . . into a federal scheme which knew it not."<sup>43</sup> *Bouligny* expressly held that *Russell* did not affect the "persons composing" rule in any way,<sup>44</sup> thereby foreclosing any extension of the corporate entity concept to unincorporated associations.<sup>45</sup>

After *Bouligny*, lower courts have assumed that unincorporated associations may not be afforded entity status for purposes of diversity jurisdiction,<sup>46</sup> and that "persons composing" is still the applicable rule.

38. See *Mason v. American Express Co.*, 334 F.2d 392, 400 (2d Cir. 1964) (relying on *Russell*, a joint stock company was deemed a "citizen"); see also *American Fed'n of Musicians v. Stein*, 213 F.2d 679, 686 (6th Cir.), cert. denied, 348 U.S. 843 (1954) (noting that *Chapman* was "losing its vitality"); *Van Sant v. American Express Co.*, 169 F.2d 355, 372 n.7 (3d Cir. 1948) (*Chapman* rule is becoming "outmoded").

39. See, e.g., *Mason v. American Express Co.*, 334 F.2d 392, 403 (2d Cir. 1964) (joint stock company treated as "citizen" for federal diversity purposes); *Van Sant v. American Express Co.*, 169 F.2d 355, 372 & n.7 (3d Cir. 1948) (same).

40. See, e.g., *Swan v. First Church of Christ Scientist*, 225 F.2d 745, 747 (9th Cir. 1955) (*Chapman* and *Great Southern* are the established rule); *Stein v. American Fed'n of Musicians*, 183 F. Supp. 99, 99-101 (M.D. Tenn. 1960) (*Chapman* is not losing its vitality); *Gaunt v. Lloyds Am.*, 11 F. Supp. 787, 790 (W.D. Tex. 1935) (*Chapman* dictates that the fiction of corporate citizenship does not extend to limited partnerships).

41. 382 U.S. 145 (1965).

42. At the time of the *Russell* decision, Puerto Rico was not considered a "State" for diversity purposes, and could not avail itself of the diversity statute. See *id.* at 152 n.10.

43. *Id.* at 151. It should also be noted that, "the effect of *Russell* was to contract jurisdiction of the federal court in Puerto Rico." *Id.* at 152.

44. See *id.* at 149-51.

45. The defendant in *Bouligny* was the United Steelworkers Union, an unincorporated association. Accordingly, the Court applied the traditional rule and held that the union's diversity status depended on the citizenship of each and every member. *Id.* at 146-47. *Bouligny* therefore reaffirms the distinction between corporations and unincorporated associations, and the vitality of the persons composing rule established in *Chapman* and *Great Southern*.

46. See, e.g., *Wroblewski v. Brucher*, 550 F. Supp. 742, 749-50 (W.D. Okla. 1982) (*Bouligny* foreclosed treating limited partnerships as entities for diversity purposes); *Larwin Mort. Inv. v. Riverdrive Mall, Inc.*, 392 F. Supp. 97, 99 (S.D. Tex. 1975) (decision not to treat unincorporated association as entity preordained by *Bouligny*); *Truck Ins. Exch. v. Dow Chem. Co.*, 331 F. Supp. 323, 324-25 (W.D. Mo. 1971) (apparent from *Bouligny* that unincorporated association is not fictional citizen). Even Judge Waterman, the author of *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964), which had proclaimed the decline of *Chapman* in favor of entity status for unincorporated associations, admitted that *Bouligny* "seriously undermined" his *Mason* decision. *Baer v. United Serv. Auto. Ass'n*, 503 F.2d 393, 396 (2d Cir. 1974).

Although preclusion of entity status for unincorporated associations has been generally accepted, a plausible argument could be made for limiting *Bouligny* to its facts. The complex structure of the labor union would have required the Court to engage in a diffi-

Yet, those who believed that unincorporated associations such as limited partnerships were being unjustly denied access to federal courts remained critical.<sup>47</sup> These courts sought a way to mitigate the harshness of *Boulogny*'s apparent preclusion of entity status and still nominally comply with the "persons composing" rule. One year after *Boulogny*, the Second Circuit in *Colonial Realty Corp. v. Bache & Co.*<sup>48</sup> offered a possible solution. In *Colonial*, the limited partnership argued that complete diversity was lacking because some of its limited partners had the same residence as the corporate plaintiff.<sup>49</sup> Since New York partnership law did not recognize limited partners as "proper parties" to a suit against a partnership, Judge Friendly concluded, without significant elaboration, that their citizenship did not count in a diversity analysis,<sup>50</sup> only the general partners were significant.<sup>51</sup> Thus, state law ultimately determined which "persons" would be considered in the "persons composing" test.

*Colonial* and its followers do not view their refinement of the "persons

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cult determination of the citizenship of that entity. *Boulogny*, 382 U.S. at 152-53. The Court chose instead to leave any change in the traditional rule to the legislature. *Id.* The difficulty encountered in *Boulogny*, however, would often not be present when the party is a different type of unincorporated association, such as a limited partnership. Thus, arguably, a variation of the citizenship rule for those simpler organizations might properly be left to the courts to develop. Nevertheless, Justice Fortas intimated that decisions to change the citizenship rule for any unincorporated association are more appropriately left to Congress. He observed that even the "easy and apparent" solution developed by the courts for citizenship of a corporation was subsequently changed by Congress. *See id.* at 152.

47. One alternative to the persons composing rule, the class action, has existed since before *Boulogny*. *See supra* note 6. The class action device has successfully been applied to the unincorporated association as a party, but cannot be used routinely because the numerosity requirement of Rule 23(a)(1) would prevent some associations from qualifying as a class. The purpose of Rule 23.2 was to give entity treatment to an association where it lacked capacity to sue or be sued as a jural person, and joinder of all members would be impractical. *See Fed. R. Civ. P. 23.2; Note, Civil Procedure—Acquiring Diversity Jurisdiction Over an Unincorporated Association*, 60 N.C.L. Rev. 194, 201 (1981). It was not meant as merely a way to circumvent diversity jurisdiction. In jurisdictions that allow a limited partnership to sue or be sued in its common name, joinder is not a problem. Accordingly, some courts have refused to permit class actions in those states. *Suchem, Inc. v. Central Aguirre Sugar Co.*, 52 F.R.D. 348, 355 (D.P.R. 1971).

A more questionable device that circumvented complete diversity was introduced in *Jones Knitting Corp. v. A.M. Pullen & Co.*, 50 F.R.D. 311 (S.D.N.Y. 1970), which held that an action against a partnership could be maintained merely by naming partners who did not destroy diversity. *See id.* at 315. The other partners were "at most necessary and not indispensable parties." *Id.* The device has been little used, and subsequently found to be "unsound" in *Cunard Line Ltd. v. Abney*, 540 F. Supp. 657, 661 (S.D.N.Y. 1982). *Cunard* neither agreed nor disagreed with *Pullen* on whether general partners were indispensable parties. It did find that even if state law allowed a suit against a partnership by naming fewer than all its members, such law would not bear on the federal jurisdiction determination wherein only article III and congressional grants of jurisdiction could be looked to. *See id.* at 662-64.

48. 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966).

49. *Id.* at 183.

50. *See id.* at 183-84 (citing New York Partnership Law § 115 (McKinney 1948) (current version at New York Partnership Law § 115 (McKinney Supp. 1986))).

51. *Id.* at 184.

composing" test as contrary to precedent, and even their critics generally agree that the Supreme Court has never addressed the precise issue<sup>52</sup> of whether limited partners should be counted for diversity. Furthermore, *Chapman* and *Great Southern* did not deal with anything resembling the modern two-tiered limited partnership.<sup>53</sup> *Boulogny* did address a multi-level organization, but it has been argued that the very complexity of the union in *Boulogny* presented unique problems to the Court that prevent broad application of that decision.<sup>54</sup> The *Boulogny* Court itself conceded its inability to formulate an appropriate citizenship test and expressly left that task to Congress.<sup>55</sup> Commentators speculate that the *Boulogny* Court would have modified the "persons composing" test had it been feasible to do so.<sup>56</sup> Therefore, it is argued, *Boulogny* should not preclude any refinement of the "persons composing" test where the much simpler limited partnership form is concerned.<sup>57</sup> With *Chapman* and *Great Southern* distinguished, and *Boulogny* interpreted narrowly, apparently nothing impeded "refinement" of the "persons composing" test.

In justifying their result, *Colonial* and its adherents tend to discount the long history of the "persons composing" test as the simple uniform rule for unincorporated associations. Had the *Boulogny* Court found this traditional rule inadequate for a multi-level association, it could have modified or abandoned the test rather than apply it. When applied to limited partnership, the test dictates that all members, including limited partners, are significant in the diversity formula. The sounder interpretation of Supreme Court precedent supports this result.

Nevertheless, some courts have improperly modified the "persons composing" test, with the result that only general partners are included.<sup>58</sup> In an attempt to identify which persons compose the partner-

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52. See *supra* note 26.

53. The joint stock company involved in *Chapman* did consist of two classes of members in the sense that only the president had capacity to sue on behalf of the company. See *Chapman v. Barney*, 129 U.S. 677, 679 (1889). In a joint stock company, however, all members share liability, and all are co-owners who control the managers of the company. J. Crane & A. Bromberg, *Law of Partnership* 178-80 (1968). The limited partnership association in *Great Southern* can be distinguished from the modern limited partnership. The former has only one class of partner; each partner subscribes to part of the capital and none of them has personal liability for the association's debts. See *id.* at 147.

54. See, e.g., *Diversity Jurisdiction*, *supra* note 19, at 670; *Aggregate Treatment*, *supra* note 16, at 329; *Limited Partnerships*, *supra* note 18, at 392 & n.60.

55. *United Steelworkers v. R.H. Boulogny, Inc.*, 382 U.S. 145, 152-53 (1965).

56. See, e.g., *Diversity Jurisdiction*, *supra* note 19, at 670 (enormous practical problems deterred *Boulogny* Court from expanding diversity); *Aggregate Treatment*, *supra* note 16, at 329 (Court feared prospect of deciding where labor union was organized); *Limited Partnerships*, *supra* note 18, at 392 & n.60 (same).

57. See *supra* note 54 and accompanying text.

58. See, e.g., *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966); *Sixth Geostatic Energy Drilling Program 1980 v. Ancor Exploration Co.*, 544 F. Supp. 297, 299-305 (N.D. Okla. 1982); *Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 709, 711 (E.D.N.Y. 1972).

*Colonial* presumably relied on a capacity to sue theory. See *supra* note 16 and accom-

ship for citizenship purposes, those courts manipulate the concepts of capacity to sue or real party in interest.

## II. CAPACITY TO SUE AND REAL PARTY IN INTEREST CONCEPTS ARE INAPPOSITE TO CITIZENSHIP

A certain overlap exists between the results of a real party in interest, a capacity to sue and a citizenship inquiry<sup>59</sup> because each has a role in the threshold issues that determine whether a case will be heard. Nevertheless, the concepts remain distinct in theory and in function.<sup>60</sup> Indeed, examination of their respective origins reveals that neither real party in interest nor capacity to sue was designed to affect federal subject matter jurisdiction.<sup>61</sup> Consequently, the failure to recognize the citizenship inquiry<sup>62</sup> as a separate part of the jurisdictional issue in a diversity case misinterprets both Supreme Court precedent and the function of the Federal Rules of Civil Procedure.

### A. Capacity to Sue

Federal Rule of Civil Procedure 17(b) provides that the capacity to sue or be sued of a named party, other than an individual or a corporation, shall be determined by the law of the forum state.<sup>63</sup> It has been argued that in determining whether complete diversity exists between a limited partnership and its opponent, courts should include the citizenship of only those members of the limited partnership with capacity to sue under the applicable state law.<sup>64</sup>

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panying text. The dissenting judge in *Carlsberg* spoke in terms of capacity, but noted that where capacity to sue and real party in interest were not the same, the real party should determine citizenship. See *Carlsberg*, 554 F.2d at 1263 (Hunter, J., dissenting). Therefore, to the extent that the later decisions rely on *Colonial* or on the dissent in *Carlsberg*, they implicitly accept a capacity to sue or a real party in interest analogy. See, e.g., *Williams v. Sheraton Inns, Inc.*, 514 F. Supp. 22, 22 (E.D. Tenn. 1980) (without further analysis, the court followed *Colonial*); *Sands v. Geller*, 321 F. Supp. 558, 561 (S.D.N.Y. 1971) (limited partners may be disregarded per *Colonial*).

59. See *infra* note 119 and accompanying text. See Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?*, 51 Minn. L. Rev. 675, 724 (1967) (suggesting abolition of real party in interest because same results are reached under capacity, joinder and substantive law).

60. See 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1541, at 633-38 (1971). See *infra* notes 109-13, 118-20, 140-41 and accompanying text. For a comparison of real party in interest with capacity to sue, see 6 C. Wright & A. Miller, *supra*, § 1542, at 639.

61. See *infra* notes 83-84, 128-29 and accompanying text.

62. See *infra* notes 66, 78-79, 118-19 and accompanying text.

63. Fed. R. Civ. P. 17(b) states:

The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held . . . .

*Id.*

64. See, e.g., *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183-84 (2d Cir.),

It may, of course, be necessary to determine who has capacity to sue in a diversity case,<sup>65</sup> but not because capacity controls citizenship.<sup>66</sup> The function of the capacity inquiry is to ensure that state law recognizes the competence of the parties before the court.<sup>67</sup> Rule 17(b) further ensures that a party who is barred by state law from bringing a particular claim does not circumvent that state law by bringing suit in federal court under diversity.<sup>68</sup> When these objectives of Rule 17(b) have been accomplished, the court then proceeds to determine the parties' respective citizenships, using the method developed by federal common law.<sup>69</sup>

It has been noted that with general partnerships, the group that has capacity to sue under state law is identical to the group whose citizenship

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*cert. denied*, 385 U.S. 817 (1966); *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1264 (3d Cir. 1977) (Hunter, J., dissenting); *Effect of Rule 17(b)*, *supra* note 21, at 283; 46 Geo. Wash. L. Rev. 657, 671 (1978).

At the time of the *Colonial* and *Carlsberg* decisions, partnership law throughout the country was basically uniform. Forty-nine states had adopted statutes modeled on the Uniform Limited Partnership Act (ULPA), and so there was little likelihood that looking to state law as part of a citizenship inquiry would lead to widely differing results. Many of the commentators who came to *Colonial*'s defense following *Carlsberg* were quick to point this out. See *Limited Partnerships*, *supra* note 18, at 394, 412 n.166; 16 Duq. L. Rev. 221, 225 n.30 (1977-78); 46 Geo. Wash. L. Rev. 657, 666 (1978). Today, some form of the Revised Uniform Limited Partnership Act (RULPA) is in force in a majority of jurisdictions. See *infra* note 91. Of those RULPA jurisdictions, 12 have adopted some variation of the section that defines the powers of the limited partners. See 6 U.L.A. 246-48 (Supp. 1985). The undesired result that the vagaries of state law may determine the boundaries of federal jurisdiction is therefore much more possible.

65. For a general discussion of capacity to sue see 6 C. Wright & A. Miller, *supra* note 60, § 1559, at 726-28. If a party is timely in raising the capacity issue, the court will determine whether the parties possess the required ability to sue or be sued. In *Johnson v. Helicopter & Airplane Servs. Corp.*, 404 F. Supp. 726 (D. Md. 1975), the action was dismissed because defendant lacked capacity to sue or be sued under the law of its state of incorporation. *Id.* at 737. The Court of Claims in *Mather Constr. Co. v. United States*, 475 F.2d 1152 (Ct. Cl. 1973) dismissed the action because California had suspended all of the plaintiff's rights for failure to pay corporate franchise taxes. *Id.* at 1154-55.

66. See *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1260 & n.24 (3d Cir. 1977) (diversity jurisdiction and capacity to sue are distinct problems); *Fifty Assocs. v. Prudential Ins. Co. of Am.*, 446 F.2d 1187, 1190 (9th Cir. 1970) ("The citizenship of each member of an unincorporated association must be alleged, even though the entity might be recognized at state law as having the ability to sue [or] . . . be sued."); 6 C. Wright & A. Miller, *supra* note 60, § 1564, at 748-49 (even when partnership or association has capacity to sue it may still fail diversity requirements); *Diversity Jurisdiction*, *supra* note 19, at 664 (capacity to sue as an entity totally distinct from citizenship status as an entity).

67. See 6 C. Wright & A. Miller, *supra* note 60, § 1559, at 726-27. In a diversity case, an individual suing on his own behalf must satisfy the law of the state in which he is a citizen, whereas one suing as a representative must satisfy the capacity requirements of the state where the federal court sits. A corporation's capacity depends on the laws of its state of incorporation. See *id.* at 727.

68. See 3A J. Moore, *Moore's Federal Practice* ¶ 17.16, at 17-192 (1985). See *infra* note 150.

69. See *Thomas v. Board of Trustees*, 195 U.S. 207, 210-13 (1904); *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 455-56 (1900); *Chapman v. Barney*, 129 U.S. 677, 682 (1889).

determines diversity status.<sup>70</sup> From this observation the erroneous inference was drawn that state capacity laws determine citizenship<sup>71</sup> for diversity purposes. The uniformity of the two groups, however, only occurs because the state law that allows each general partner to sue coincidentally yields the same result as the jurisdictional rule requiring the citizenship of all persons composing the unincorporated association to be included. This coincidence does not occur with the limited partnership because the persons composing it include more than just those with capacity to sue.<sup>72</sup>

The distinction is not unique to the limited partnership. In *Bouligny*, the union had capacity to sue as a party; it was subject matter jurisdiction that was lacking.<sup>73</sup> Clearly, the Court did not hold that capacity simultaneously determines citizenship.

The converse, that citizenship does not simultaneously confer capacity, may also be true. For example, when a foreign corporation does business in New York without a license, it lacks capacity to sue in New York courts<sup>74</sup> and, therefore, also lacks capacity to sue in federal courts sitting in New York.<sup>75</sup> In such a case, the deficiency in the corporate party has nothing to do with the power of the court to hear the case. That same corporation may be subject to the court's jurisdiction as a defendant,<sup>76</sup> and, assuming the plaintiff is diverse from the corporation, the federal court would have subject matter jurisdiction.<sup>77</sup>

Finally, to confer jurisdictional powers on Rule 17(b) not only was beyond the contemplation of the creators of the Federal Rules, but also was expressly prohibited by them.<sup>78</sup> Rule 82 forbids construing the

70. See *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1263 (3d Cir. 1977) (Hunter, J., dissenting). The result occurs in states in which a general partnership may sue or be sued in the name of any of its members. Thus, each partner may sue, and each partner is counted for diversity purposes.

71. See *id.* at 1263-64 (Hunter, J., dissenting).

72. Limited partners are members of the association, but they are ordinarily denied capacity to sue in both ULPA and RULPA jurisdictions. See U.L.P.A. § 26 (1916) (limited partners are not proper parties to a suit). The R.U.L.P.A. § 1001 (1976) expressly mentions only one instance when a limited partner may sue: to bring a derivative suit when the general partners have refused to do so, or when a request to them would be futile.

73. See *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 150-51 (1965).

74. See N.Y. Bus. Corp. Law § 1312(a) (McKinney 1963).

75. See *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537-38 (1948) (confirming the decision in *Angel v. Bullington*, 330 U.S. 183 (1947), which held that where a state court has closed its doors to a particular litigant, the federal court is precluded from maintaining diversity jurisdiction).

76. N.Y. Bus. Corp. Law § 1312(b) (McKinney 1963).

77. There are cases where a state door-closing statute does not promote a clear state policy, and has the effect of discriminating against nonresidents. There, the federal interest in providing a convenient forum for the action might persuade a federal district court that the state statute does not restrict the federal court's jurisdiction. See *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60, 66 (4th Cir. 1965).

78. Fed. R. Civ. P. 82 states in pertinent part: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions

Rules to expand or contract federal jurisdiction.<sup>79</sup> A fortiori, it precludes application of a Rule as a per se jurisdictional test.

Even assuming that the rationale equating capacity with citizenship is valid, a "general partners only" rule would not always result when applied to limited partnerships.<sup>80</sup> If under state law a limited partnership can stand before the court as a named party,<sup>81</sup> then a capacity inquiry would point to giving the limited partnership entity status. Lower courts, however, assume that the Supreme Court has precluded entity

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therein." *Id.* According to the Constitution, Congress creates or withholds the jurisdiction of the lower federal courts. See U.S. Const. art. III, § 1. By means of the Enabling Act of June 19, 1934, Pub. L. No. 415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1982)), Congress authorized the Supreme Court to prescribe general rules governing practice and procedure in civil suits, and directed that those rules "shall not abridge, enlarge or modify any substantive right." *Id.* The members of the advisory committee that drafted the Federal Rules of Civil Procedure were aware of the scope and the limits of their authority. Dean Clark remarked that Rule 82 was to be read as an addition to all the rules. Clark, Remarks, 1938 Federal Rules of Civil Procedure: Proceedings of the Institute at Washington, D.C. 60 (Oct. 6, 1938) (remarks of Dean Clark, Reporter to and Member of the Advisory Committee for drafting the Rules).

In discussing the operation of Rule 17 with respect to an unincorporated association as a party, Mr. Tolman emphasized that the intent of the committee was to make no change in existing case law. Tolman, Remarks, 1938 Federal Rules of Civil Procedure: Proceedings of the Institute at Cleveland 66 (July 21-23, 1938) (remarks of Mr. Tolman, Secretary of the Advisory Committee for drafting the Rules). The committee's intent was to codify the result in *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922), which held that an unincorporated association was suable as an entity when it violated a federal statute. *Id.* at 385-91. Prior to adoption of the Rules, the scope of *Coronado* had been narrowed by subsequent Supreme Court decisions, which held that unless authorized by statute, an unincorporated association has no capacity to sue or be sued as an entity. See *Moffat Tunnel League v. United States*, 289 U.S. 113, 118-19 (1933); *Brown v. United States*, 276 U.S. 134, 141-42 (1928).

79. See *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1261 (3d Cir. 1977) (Rule 82 bars use of Rule 17 to affect jurisdiction); Fed. R. Civ. P. 82; 3A J. Moore, *supra* note 68, ¶ 17.25, at 17-258 (the Rules "do not touch" the theories of jurisdiction).

Even Rule 23, which provides for the class action device, neither limits nor expands jurisdiction. 3B J. Moore, *supra* note 68, ¶ 23.02[5], at 23-79. Nevertheless, it is not possible to say that Rule 23 has absolutely no effect on the outcome of a jurisdictional inquiry. By allowing the class action device, Rule 23 permits persons who might otherwise destroy diversity to be represented in federal court. Only the named representatives need meet the diversity requirements. See C. Wright, *supra* note 6, at 484. The use of the class action in a diversity case, however, has been largely destroyed due to *Snyder v. Harris*, 394 U.S. 332 (1969) and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) which held that every member of the class must satisfy the ten thousand dollar jurisdictional amount. *Snyder*, 394 U.S. at 335-36; *Zahn*, 414 U.S. at 301.

80. See *infra* note 85 and accompanying text.

81. See *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436, 437 (7th Cir. 1984) (plaintiff-appellant was an Illinois limited partnership); *Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 357 n.1 (D.C. Cir. 1983) (per curiam) (plaintiff-appellant was a limited partnership recognized by the District of Columbia); *Windward City Center v. Transamerica Occidental Life Ins. Co.*, 613 F. Supp. 1216, 1217 (D. Hawaii 1985) (plaintiff-appellant was a Hawaii limited partnership); *Schmidt v. E.N. Maisel & Assocs.*, 105 F.R.D. 157, 157 (E.D. Ill. 1985) (defendant-appellee was a limited partnership of Michigan).

status for partnerships.<sup>82</sup>

Capacity alone as a test for diversity conflicts with the rules as articulated by the Supreme Court. It is, moreover, beyond the purpose of Rule 17(b). At one time, common law did not recognize an unincorporated association's right to sue or be sued as an entity. Today, some states allow it by statute.<sup>83</sup> Rule 17(b) merely requires federal courts to follow state law in determining whether to allow an unincorporated association to sue as an entity.<sup>84</sup> Consequently, Rule 17(b) is irrelevant to the diversity jurisdiction inquiry which, until the Supreme Court or Congress acts otherwise, still looks to the citizenship of each member of an unincorporated association.

### B. "Capacity Plus"

In an effort to reconcile the exclusion of limited partners with the "persons composing" rule mandated by the Supreme Court, some commentators have urged an analysis that includes those who have both capacity to sue under Rule 17(b) and those who share liability and participate in the control of the business—a "capacity plus" inquiry.<sup>85</sup> Such an analysis follows Supreme Court precedent no better than an unembellished Rule 17(b) analysis.<sup>86</sup> Not only is the standard by which a court would measure control and liability somewhat uncertain, but its application would fail to recognize only general partners as jurisdictionally significant.

A general partner may actually have less at stake than a limited partner when the limited partnership becomes a party defendant in a civil action. It is true that limited partners are only liable for partnership debts up to the amount of their contribution,<sup>87</sup> while general partners may also be jointly and severally liable as individuals.<sup>88</sup> Any individual

82. See *supra* note 46 and accompanying text.

83. See 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1861, at 451 (1972). The common law regarded partnerships as aggregates of individuals, not as entities. See J. Crane & A. Bromberg, *Law of Partnership* 18-19 (1968).

84. See 6 C. Wright & A. Miller, *supra* note 60, § 1564, at 740-42; 7A C. Wright & A. Miller, *supra* note 83, § 1861, at 451.

85. This analysis was proposed a year after the *Carlsberg* decision. See *Limited Partnerships*, *supra* note 18, at 400-02. The author noted that a pure Rule 17(b) analysis would not explain the general partners only result of the *Colonial* line of cases. See *id.* at 401. However, if controlling persons who lacked capacity to sue, namely other general partners, were also included, the desired result would occur. The author believed that his extended capacity inquiry would yield a result identical to a real party in interest inquiry. See *id.* at 402-04.

86. Insofar as it would result in less than all the members of the limited partnership being counted for diversity purposes, the test conflicts with *Chapman v. Barney*, 129 U.S. 677 (1889) and *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900), which were endorsed in *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980).

87. R.U.L.P.A. § 303 (1976); U.L.P.A. § 7 (1916).

88. Section 9 of the ULP.A. refers to the liability of general partners in limited partnerships. It incorporates by reference the Uniform Partnership Act's section on partners' liability: "All partners are liable: (a) Jointly and severally for everything chargeable to

liability, however, is no more than potential when only the partnership is being sued, because without gaining personal jurisdiction over particular partners and joining them to the action as individuals, their own assets cannot be reached.<sup>89</sup> No one, as a general rule, is subject to personal liability when the suit is against the limited partnership.<sup>90</sup> Since only the partnership assets are at risk, and often the contribution of the limited partners toward the purchase of those assets exceeds that of the general partners, the limited partners' liability may actually be greater than that of the general partners. Accordingly, limited partners could readily be included under the liability analysis. Furthermore, when the partnership is plaintiff, the liability prong of the "capacity plus" approach is meaningless.

Similarly, limited partners could satisfy a control inquiry, especially in those jurisdictions that have modeled their limited partnership statute on the Revised Uniform Limited Partnership Act (RULPA),<sup>91</sup> which gives

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the partnership under sections 13 and 14." [including "Wrongful Acts" and "Breaches of Trust"]. U.P.A. § 15 (1914).

89. See, e.g., *Detrio v. United States*, 264 F.2d 658, 661-62 (5th Cir. 1959) (personal property of partners who were not personally served is not subject to judgments against the partnership); *Antiel v. V.W.E. Inv.*, 353 N.W.2d 681, 683 (Minn. App. 1984) (judgment binds partnership, but not individual partners improperly served); *Eule v. Eule Motor Sales*, 34 N.J. 537, 547, 170 A.2d 241, 246 (1961) (judgment against partnership does not bind partners individually).

Of course, the "potential" personal liability of the general partners often becomes actual liability when the general partners are served individually. Yet, the resolution of a jurisdictional inquiry to determine the citizenship of a partnership party should not depend on the presence or absence of other individual defendants. The scope of any citizenship inquiry should be confined to the characteristics of the particular party.

90. In the extraordinary situation where a judgment forces a partnership into bankruptcy, and the partnership assets are insufficient, the partners "must contribute towards the losses." U.P.A. § 18(a) (1914); see *Crane & Bromberg*, *supra* note 83, at 524. The same is true for general partners in a limited partnership, whereas the limited partners' surplus of assets over liabilities is not counted as property of the bankrupt partnership. *Id.* at 529, 562.

91. See Ala. Code §§ 10-9A-1 to -203 (Supp. 1985); Ariz. Rev. Stat. Ann. §§ 29-301 to -366 (Supp. 1985); Ark. Stat. Ann. §§ 65-501 to -566 (1980 & Supp. 1985); Cal. Corp. Code §§ 15511-15623, 15611-15723 (West Supp. 1986); Colo. Rev. Stat. §§ 7-62-101 to -1201 (Supp. 1984); Conn. Gen. Stat. Ann. §§ 34-9 to -380 (West 1981 & Supp. 1985); Del. Code Ann. tit. 6, §§ 17-101 to -1107 (Supp. 1984); Idaho Code §§ 53-201 to -267 (Supp. 1985); Iowa Code Ann. §§ 545.101-1106 (West Supp. 1985); Kan. Stat. Ann. §§ 56-1a101 to -1a607 (1983); Md. Corps. & Ass'ns Code Ann. 10-101 to -1104 (1985); Mass. Gen. Laws Ann. ch. 109, §§ 1-62 (Michie/Law. Co-op. 1985); Mich. Comp. Laws Ann. §§ 449.1101-2108 (West Supp. 1985); Minn. Stat. Ann. §§ 322A.01-.87 (West 1981 & Supp. 1985); Mo. Ann. Stat. §§ 359.011-.691 (Vernon Supp. 1986) (effective Jan. 1, 1987); Mont. Code Ann. §§ 35-12-501 to -1404 (1985); Neb. Rev. Stat. §§ 67-233 to -297 (1981); Nev. Rev. Stat. §§ 88-315 to -645 (1985) (effective Jan. 1, 1987); N.J. Rev. Stat. §§ 42:2A-1 to -72 (Supp. 1985); N.D. Cent. Code §§ 45-10.1-01 to -62 (Supp. 1985); Ohio Rev. Code Ann. §§ 1782.01-.62 (Page 1985); Okla. Stat. Ann. tit. 54, §§ 301-364 (West Supp. 1985); R.I. Gen. Laws §§ 7-13-1 to -65 (1985); S.C. Code Ann. §§ 33-42-10 to -2020 (Law. Co-op Supp. 1985); Va. Code §§ 50-73.1 to -77 (Supp. 1985) (effective Jan. 1, 1987); Wash. Rev. Code Ann. §§ 25.10.010-.690 (Supp. 1986); W. Va. Code §§ 47-9-1 to -63 (Supp. 1985); Wis. Stat. Ann. §§ 179.01-.94 (Supp. 1985); Wyo. Stat. §§ 17-14-201 to -1104 (Supp. 1985).

far more power to the cautious limited partner than does the original Uniform Limited Partnership Act (ULPA).<sup>92</sup> Sections 302<sup>93</sup> and 303<sup>94</sup> of the RULPA give a limited partner considerable power in certain circumstances without the concomitant<sup>95</sup> risk of incurring a general partner's liability. Limited partners in RULPA jurisdictions can remove general partners<sup>96</sup> and bring derivative suits.<sup>97</sup> They may vote and veto extensively concerning important matters if the partnership agreement allows them to do so,<sup>98</sup> may act as the partnership's agents, contractors, employees or sureties,<sup>99</sup> and may seek dissolution of the partnership.<sup>100</sup>

Even under the original act,<sup>101</sup> still in force in a sizable minority of jurisdictions,<sup>102</sup> limited partners have certain powers,<sup>103</sup> including voting

92. See *infra* note 95. Compare U.L.P.A. § 10 (1916) (limiting the powers of the limited partners) and *id.* § 9 (listing the decisions that general partners may not make without the limited partners' consent) with R.U.L.P.A. § 302 (1976) (giving limited parties the right to vote on any matter if partnership agreement allows).

93. RULPA section 302 states that subject only to § 303, "the partnership agreement may grant to all or a specified group of the limited partners the right to vote (on a per capita or other basis) upon any matter." R.U.L.P.A. § 302 (1976).

94. RULPA section 303 reads:

Liability to Third Parties—

(a) Except as provided in subsection (d), a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. However, if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, *he is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control.*

*Id.* § 303 (emphasis added).

Part (b) of this section is a non-exclusive but extensive list of the activities in which a limited partner may participate *without* "participating in the control" of the business. See *id.* § 303(b).

95. A policy behind the creation of the RULPA was to extend the powers of the limited partners. Proceedings in Committee of the Whole National Conference of Commissioners on Uniform State Laws 89 (Aug. 2-4, 1976) [hereinafter cited as Uniform Laws Proceedings]. Although there was protest that §§ 302(a) and 302(b)(2) read together meant that limited partners could virtually control the partnership, *id.* at 82, a motion to strike part of § 303(a) was not carried. *Id.* at 98-99.

96. See R.U.L.P.A. § 303(b)(5)(v) (1976); ALI Materials 1983, *supra* note 26, at 95-97.

97. See R.U.L.P.A. § 1001 (1976) (conditions the limited partners' ability to bring derivative suits).

98. See *id.* § 302 (stating that subject to § 303 (Liability to Third Parties) the partnership agreement may grant to all limited partners the right to vote on any matter).

99. See *id.* § 303(b)(1)-(3); 6 Resource Materials: Partnership 63 (ALI Continuing Education Series 1985) [hereinafter cited as ALI Materials 1985].

100. See R.U.L.P.A. § 303(b)(5)(i) (1976); ALI Materials 1983, *supra* note 26, at 44.

101. Several states, however, have modified ULPA § 7 to particularize certain activities in which limited partners may safely participate. See ALI Materials 1983, *supra* note 26, at 57. The Texas statute is especially comprehensive. See Tex. Rev. Civ. Stat. Ann. art. 6132a, § 8[b] (Vernon Supp. 1986) (greatly enlarges a limited partner's powers, and adds a reliance factor similar to that of the RULPA).

102. Alaska Stat. §§ 32.10.010-.290 (1962); D.C. Code Ann. §§ 41-201 to -229 (1981 & Supp. 1985); Fla. Stat. Ann. §§ 620.01-.32 (West 1977 & Supp. 1985); Ga. Code Ann. §§ 14-9-1 to -91 (1984); Hawaii Rev. Stat. §§ 425-21 to -52 (1976 & Supp. 1984); Ill. Ann.

rights<sup>104</sup> and the ability to act as advisors or consultants when the partnership is experiencing difficulty.<sup>105</sup> They have the power to cause dissolution of the partnership<sup>106</sup> and may be the directors of a corporation that is the sole general partner.<sup>107</sup> Furthermore, even though their control is technically curbed by statute, it is uncertain how much influence the monied limited partners exert.

Therefore, a jurisdictional test that looks beyond capacity to sue and also counts members with liability or control, or both,<sup>108</sup> would not consistently yield a "general partners only" result, because in some situations the limited partners may exercise more power and have more capital at risk than the general partners.

### C. *Real Party in Interest*

In an analysis similar to that of capacity to sue, some commentators have focused on the real party in interest concept<sup>109</sup> as a rationale for

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Stat. ch. 106½, §§ 44-73 (Smith-Hurd 1952 & Supp. 1985); Ind. Code Ann. §§ 23-4-2-1 to -31 (Burns 1984); Ky. Rev. Stat. Ann. 362.410-700 (Bobbs-Merrill 1972 & Supp. 1984); Me. Rev. Stat. Ann. tit. 31, §§ 151-181 (1964 & Supp. 1985); Miss. Code Ann. §§ 79-13-1 to -57 (1972); N.H. Rev. Stat. Ann. §§ 305:1-30 (1984); N.M. Stat. Ann. §§ 54-2-1 to -30 (1978); N.Y. Partnership Law §§ 90-1201 (McKinney Supp. 1986); N.C. Gen. Stat. §§ 59-1 to -30 (1982); Or. Rev. Stat. §§ 69.150-530 (1984); Pa. Stat. Ann. tit. 59, §§ 501-545 (Purdon Supp. 1985); S.D. Codified Laws Ann. §§ 48-6-1 to -64 (1983); Tenn. Code Ann. §§ 61-2-101 to -130 (1980 & Supp. 1985); Tex. Rev. Civ. Stat. Ann. art. 6132a, §§ 1-31 (Vernon 1970 & Supp. 1986); Utah Code Ann. §§ 48-2-1 to -27 (1981); Vt. Stat. Ann. tit. 11, §§ 1391-1419 (1984). Louisiana is the only state that recognizes neither the ULPA nor the RULPA. Its equivalent to the limited partnership is the "partnership *in commendam*," addressed in La. Civ. Code Ann. art. 2839-2851 (West 1952 & Supp. 1985).

103. See U.L.P.A. § 10 (1916). For a further discussion of the limited partners' powers to bring derivative suits or seek dissolution under § 10, see ALI Materials 1983, *supra* note 26, at 82-84.

104. See U.L.P.A. § 9(1)(e) (1916) (consent of all limited partners needed to admit person as general partner); R.U.L.P.A. § 401 (1976) (each partner must agree to admission of new general partners). "Partner" is defined as limited or general in RULPA § 101(8). See ALI Materials 1983, *supra* note 26, at 96.

105. See *Weil v. Diversified Properties*, 319 F. Supp. 778, 782 (D.D.C. 1970).

106. See U.L.P.A. § 10(1)(c) (1916); ALI Materials 1983, *supra* note 26, at 83-84.

107. See *Frigidaire Sales Corp. v. Union Properties Inc.*, 88 Wash. 2d 400, 405, 562 P.2d 244, 247 (1977). *But see Delaney v. Fidelity Lease Ltd.*, 526 S.W.2d 543, 546 (Tex. 1975) (limited partner personally liable if he participates in control of partnership business as officer of corporate general partner).

108. A functional test that examines each partner's contributions and control would be lengthy and impractical. See *infra* notes 149-53 and accompanying text. A presumption that limited partners do not exercise any significant control in a limited partnership exceeding a determined number of members would not solve the problem, since the party opposed to the result of the presumption would be entitled to rebut it. The court would then still be required to engage in a sometimes difficult threshold inquiry. Moreover, it would be difficult to create a realistic presumption concerning how much capital each limited partner had contributed.

109. Fed. R. Civ. P. 17(a) states in pertinent part:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of an-

excluding limited partners.<sup>110</sup> Although the Supreme Court in *Navarro Savings Association v. Lee*<sup>111</sup> examined the role of a real party in interest inquiry within the diversity analysis,<sup>112</sup> the decision cannot properly be interpreted as an endorsement of real party in interest as determinative of whose citizenship is significant in a diversity case.<sup>113</sup> In *Navarro*, eight individual trustees of a business trust sued in their own names in federal court with jurisdiction based on diversity of citizenship.<sup>114</sup> Defendant, a Texas savings association, argued that the plaintiff was the business trust itself, which was in substance an unincorporated association, whose beneficial shareholders were therefore relevant in a diversity inquiry.<sup>115</sup> Because some of those shareholders were Texas citizens, defendant argued, complete diversity was lacking.<sup>116</sup> The Court, however, pointed out that the plaintiff was not the business trust. Rather, the individual trustees, who were long recognized as entitled to bring diversity suits in their own names on the basis of their own citizenship, were the plaintiffs.<sup>117</sup>

Any attempt to extend *Navarro* to justify a "general partners only" rule in the limited partnership situation fails for two reasons. First, the

other, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought . . . .

*Id.* Every action must be prosecuted by the person who, according to substantive law, is entitled to enforce some legal right. See 6 C. Wright & A. Miller, *supra* note 60, § 1543, at 643; *Business Entities*, *supra* note 18, at 251. Federal common law recognizes that certain persons who bring suit in a representative capacity should be considered the real parties in interest rather than the ones for whose benefit the suit is brought. See 6 C. Wright & A. Miller, *supra* note 60, § 1548, at 667-70. Nevertheless, because it assumes that those representatives enumerated are granted the capacity to sue under applicable state law, Rule 17(a) alone does not dispose of the question.

110. See, e.g., Note, *Diversity of Citizenship and the Limited Partnership: A "Real Party" Rule as Federal Common Law*, 71 Iowa L. Rev. 235, 263 (1985) [hereinafter cited as *Common Law*]; *Business Entities*, *supra* note 18, at 247-49 (1978); *Limited Partnerships*, *supra* note 18, at 402-04; *Real Parties*, *supra* note 10, at 1063-65.

111. 446 U.S. 458 (1980).

112. See *id.* at 460.

113. Respondents had emphasized that they were bringing suit as individuals, and that the trust for whom they were the trustees was not a party. Respondents' Brief at 3, *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1982). As early as 1808, trustees of express trusts could bring diversity actions in their own names on the basis of their own citizenships. *Chappedelaine v. Dechenaux*, 8 U.S. (4 Cranch) 306, 308 (1808). Now Rule 17(a) provides that such trustees are real parties in interest. The *Navarro* Court recognized this status, but emphasized that the Rule 17(a) real party in interest standard is *not* identical to the rule that diversity jurisdiction depends on the citizenship of the real parties to the controversy. See *Navarro*, 446 U.S. at 462 n.9.

114. See *Navarro*, 446 U.S. at 459.

115. See Petitioner's Brief at 16, *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1982). Petitioner's sole point of argument was that the real estate investment trust involved was an unincorporated association and not an express trust. See *id.* at 8. Accordingly, *Chapman and Great Southern* control and the residence of each shareholder was significant. See *id.* at 21-24. Although the Supreme Court disagreed with the classification of the trust as an unincorporated association, it did cite *Chapman and Great Southern* with approval. See *Navarro*, 446 U.S. at 461.

116. See Petitioner's Brief at 8-9, *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1982).

117. See *Navarro*, 446 U.S. at 462.

Supreme Court expressly distinguished the business trust involved in that case from an unincorporated association.<sup>118</sup> More importantly, even within the business trust context, the Court did not find real party in interest to be dispositive of the citizenship inquiry in a diversity analysis.<sup>119</sup>

Although real party in interest, like capacity to sue, does play a part in a court's overall decision on whether it can hear a case,<sup>120</sup> it does not bear on the citizenship issue. In *Navarro*, the Court first decided that the business trust was an express trust.<sup>121</sup> Consequently, Rule 17(a), codifying a longstanding common law rule,<sup>122</sup> expressly allowed the trustees to sue in their own right without regard to the citizenship of the trust beneficiaries.<sup>123</sup> Since the trustees sued as individuals, the Court ruled that the entity was simply not a party to the suit.<sup>124</sup>

Attempts have been made to extend by analogy the real party in interest analysis to limited partnerships in order to justify excluding the citizenship of limited partners.<sup>125</sup> The analogy, however, fails<sup>126</sup> for several reasons. Initially, it must be emphasized that the history of Rule 17(a) lacks any direct jurisdictional purpose.<sup>127</sup> The Rule was originally

118. *See id.*

119. *See id.* n.9. Because there is a "rough symmetry," *id.*, between Rule 17(a)'s real party in interest standard and the rule that diversity jurisdiction depends on the citizenship of real parties to the controversy, it may be that in many cases the real party in interest and the one whose citizenship is examined for diversity are identical. This identical result, however, will not occur in all cases. *See id.* The Court noted that in *Boulogny*, the labor union was the Rule 17(a) real party in interest, but for diversity purposes, the union had to rely on the citizenship of each of its members. *See id.*

120. Real party in interest identifies the person who possesses an enforceable right, and is limited to plaintiffs. 6 C. Wright & A. Miller, *supra* note 60, § 1542, at 639.

121. *See Navarro*, 446 U.S. at 462.

122. *See infra* note 137.

123. Rule 17(a) states in pertinent part: "An executor, administrator, guardian, bailee, trustee of an express trust, . . . or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought." Fed. R. Civ. P. 17(a).

124. *See Navarro*, 446 U.S. at 459-62.

125. *See, e.g., Elston Inv. Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436, 438 (7th Cir. 1984) (defendant unsuccessfully argued business trust-limited partnership analogy); *Real Parties*, *supra* note 10, at 1063-65 (real party in interest analysis is well suited to limited partnerships). Even before *Navarro* contributed to the real party analysis, it had been suggested that the citizenship of the real party in interest was significant in determining diversity. *See Lee v. Navarro Sav. Ass'n*, 597 F.2d 421, 425-27 (5th Cir. 1979) (dicta) (court analogized a business trust to a limited partnership), *aff'd*, 446 U.S. 458 (1980); *Common Law*, *supra* note 110, at 264 (limited partnerships should proceed under real party jurisdictional rule similar to *Navarro*); *Business Entities*, *supra* note 18, at 247-51 (real party in interest should determine citizenship in diversity cases).

126. *See, e.g., New York State Teachers Retirement Sys. v. Kalkus*, 764 F.2d 1015, 1018 (4th Cir. 1985) (analogy approach rejected); *Elston Inv., Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436, 438 (7th Cir. 1984) (same); *Trent Realty Assocs. v. First Fed. Sav. & Loan Ass'n*, 657 F.2d 29, 32 (3d Cir. 1981) (same).

127. *See* 3A J. Moore, *supra* note 68, ¶ 17.09[1.-1], at 17-82 ("At the outset it must be remembered that Rule 17(a) does not enlarge or restrict federal jurisdiction.").

drafted to assist only plaintiffs.<sup>128</sup> Although the Rule has since developed a protective function vis a vis the defendant as well—to ensure proper preclusive effect to the judgment and to shield the defendant from multiple suits rightly brought together<sup>129</sup>—this purpose has no bearing on the jurisdictional issue.<sup>130</sup> Furthermore, as stated earlier, Rule 82 prohibits expansion or contraction of federal jurisdiction through construction of the Federal Rules of Civil Procedure.<sup>131</sup>

*Navarro* itself does not sanction use of a real party in interest test to determine jurisdiction.<sup>132</sup> Even if *Navarro* could be read to sanction its use in the business trust case, it should not be extended to other entities merely because their structures are somewhat similar.<sup>133</sup> In *Navarro*, the Court could not resolve the jurisdictional question until it had properly categorized the business trust as an unincorporated association, a corporation or an express trust.<sup>134</sup> The Court duly noted the similarities between business trusts and unincorporated associations, and that they also shared some corporate characteristics, yet none of these factors was decisive.<sup>135</sup> Instead, the Court found that the business trust was an express trust.<sup>136</sup> No policy considerations went into the *Navarro* Court's determination. After determining that respondent was an express trust, the Court applied the proper citizenship test for express trusts. Because one hundred and fifty years of precedent allowed trustees of an express trust to bring diversity actions in their own names and on the basis of their own citizenship, no new rule was needed.<sup>137</sup> Unincorporated associations, like limited partnerships that do not come under the express trust label, do not come under the scope of *Navarro*.

Although, as in *Navarro*, the real party in interest and the citizenship

128. See *White Hall Bldg. Corp. v. Profexray Inc.*, 387 F. Supp. 1202, 1206 (E.D. Pa. 1974) (the purpose of 17(a) was to change the old common law rule that prevented an assignee of a chose in action from prosecuting except in the name of the assignor), *aff'd sub nom. Quaglia v. Profexray Inc.*, 578 F.2d 1375 (1978); 3A J. Moore, *supra* note 68, ¶ 17.09[1.-1], at 17-82 (same).

129. See *Commonwealth of P.R. v. Cordeco Dev. Corp.*, 534 F. Supp. 612, 614 (D.P.R. 1982); *James v. Nashville Bridge Co.*, 74 F.R.D. 595, 597 (N.D. Miss. 1977).

130. See *supra* note 127 and accompanying text. Moreover, real party in interest objections can be waived. See 6 C. Wright & A. Miller, *supra* note 60, § 1554, at 700-02. Subject matter jurisdiction of course can never be waived by the parties. See *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 384 (1884).

131. See *supra* notes 78-79 and accompanying text.

132. See *supra* note 126 and accompanying text.

133. Cf. *Navarro*, 446 U.S. at 463 n.10 (Court has never analogized express trusts to business entities for diversity purposes). See *supra* note 125 and accompanying text.

134. See *Navarro*, 446 U.S. at 461-62.

135. See *id.* at 462.

136. See *id.*

137. See *id.* at 465-66. The Court cited *Chappedelaine v. Dechenaux*, 8 U.S. (4 Cranch) 306, 307-08 (1808), which held that trustees of an express trust were entitled to bring diversity actions in their own names, based on their own citizenship. See *Navarro*, 446 U.S. at 462.

inquiries often yield the same result,<sup>138</sup> the two nonetheless remain distinct. Indeed, the Court emphasized that the “two rules serve different purposes and need not produce identical outcomes in all cases.”<sup>139</sup> It thereby expressly distinguished the real party in interest of Rule 17(a) from the relevant real party for citizenship. The notion of real party for citizenship used in *Navarro*<sup>140</sup> is no more than another way of identifying which persons had figured in *Great Southern*’s “persons composing” test.<sup>141</sup> Ever since that decision, courts have implicitly relied on the real party for citizenship concept to determine which persons should be deemed to compose a given association before applying a “persons composing” test.

Real party for citizenship does not lose its significance merely because it sometimes coincides with real party in interest.<sup>142</sup> It is true, however, that courts often neglect to articulate real party for citizenship as a separate concept once real party in interest has been determined. In *Navarro*, the Supreme Court voiced a concept essential to the vitality of the “persons composing” test: real party for citizenship and real party in interest are clearly distinct, and it is real party for citizenship that determines whose citizenship is significant if the results of each inquiry are not identical.<sup>143</sup> Thus, it is improper to analogize between individuals who traditionally may sue in their own right and associations, some members of which, by virtue of their designation as real parties in interest, may sue in a representative capacity on behalf of the association.

Considerations unrelated to jurisdictional considerations for unincorporated associations gave rise to the capacity to sue and real party in interest concepts.<sup>144</sup> Neither was pertinent in the creation of the “persons composing” rule; neither is significant in its application.

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138. See *Navarro*, 446 U.S. at 462 n.9. This is the usual result when individuals sue in their own names, as did the trustees in *Navarro*. See *id.* at 458-59.

139. See *id.* at 462 n.9.

140. See *id.*

141. In *Navarro*, the Court stated that only “persons” could be real parties to a controversy. See *id.* at 461. Historically, the unincorporated association has not been recognized as a “person,” but rather as a mere collection of individuals. See *id.* The individuals qualify as the “persons” able to be real parties to the controversy. See *id.* The citizenship of these real party “persons”—the several individuals—determines diversity. See *id.* The real parties referred to are not the Rule 17(a) real parties in interest, but the real parties to the controversy, a distinction the Court explicitly makes later in its opinion. See *id.* at 462 n.9. Thus, it is the real parties to the controversy who are the “persons” in the traditional persons composing rule. See *id.* at 460.

142. Such obviously is the case where one individual sues another. Where a class has been certified, the named representatives are both real parties in interest and the only ones whose citizenship will be considered for diversity. See C. Wright & A. Miller, *supra* note 60, at 170.

143. See *Navarro*, 446 U.S. at 462 n.9. See *supra* note 141 and accompanying text.

144. See *supra* notes 66, 127-28 and accompanying text.

### III. UNDERLYING POLICY CONSIDERATIONS FAVOR INCLUDING LIMITED PARTNERS IN THE DIVERSITY FORMULA

Whatever the realities of the early eighteenth century that gave rise to diversity jurisdiction,<sup>145</sup> many modern judges and commentators agree that its principal justification, fear of local prejudice,<sup>146</sup> is generally unfounded today.<sup>147</sup> Since diversity accounts for a large percentage of cases heard by the federal courts,<sup>148</sup> parties presenting genuine federal questions are delayed, and the federal system is overburdened.

Moreover, because it is often unclear which members of the limited partnership are truly "limited,"<sup>149</sup> application of a rule that looks to the citizenship of only general partners would be difficult. It is possible for some to have become general partners by exercising too much control.<sup>150</sup> The "control" test comes from the ULP, which unfortunately fails to

145. See Hart & Wechsler, *supra* note 4, at 893-94; Note, *The Historic Basis of Diversity Jurisdiction*, *supra* note 4, at 492-99.

146. Legislative history concerning the adoption of diversity jurisdiction, both in the Constitution and in the Judiciary Act of 1789, is disappointingly scant. Some opposition to it was expressed even among the founding fathers, but little rationale for its support has been preserved. See *The Historic Basis of Diversity Jurisdiction*, *supra* note 4, at 487-88. Chief Justice Marshall alluded to "fears and apprehensions" on the part of aliens or citizens of different states who would otherwise find themselves before state tribunals. See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809). Justice Story mentioned state prejudices and jealousies as the only reasons stated that could account for diversity. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). He offered no opinion on the soundness of the constitutional presumption that such prejudices existed. See *id.* James Madison, a proponent of diversity, believed that its need and therefore its existence would be only temporary, because Congress would return the power to hear diversity cases to the state courts once they were on "good footing." 3 Elliot's Debates on the Federal Constitution 536 (J. Elliot rev. ed. 1891).

147. See *Lumbermen's Mut. Casualty Co. v. Elbert*, 348 U.S. 48, 53-60 (1954) (Frankfurter, J., concurring) (scathing criticism of diversity jurisdiction); C.J. Burger's 1977 Report to the American Bar Association, 63 A.B.A. J. 504, 506 (1977) (fear of prejudice is unfounded today) [hereinafter cited as Burger]; Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 UMKC L. Rev. 347, 349 (1978) (prejudice today is minimal or nonexistent); Rubin, *supra* note 22, at 16-17; cf. Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 Harv. L. Rev. 963 (1979) (advances the advantages of abolishing diversity without directly refuting the prejudice argument). But see Frank, *For Maintaining Diversity Jurisdiction*, 73 Yale L.J. 7, 12 (1963) (prejudice must be taken into account); Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 Brooklyn L. Rev. 197, 201-05 (1982) (state court bias is a valid reason to retain diversity); McFarland, *Diversity Jurisdiction: Is Local Prejudice Feared?*, *Litigation*, Fall 1980, at 38, 55 (fear of local prejudice is still widespread).

148. OCA Statistics for the 12 months ended June 30, 1984 show that of the approximately 150,000 civil cases filed in federal court in which the United States was not a party, approximately 38% were diversity cases. See OCA Statistics, *supra* note 22, Table C-2, at 253-55. Diversity actions account for one third of all trials and one half of all jury days in federal court. See Rubin, *supra* note 22, at 18.

149. See Abrams, *Imposing Liability for "Control" Under § 7 of the ULP*, 28 Case W. Res. L. Rev. 785, 786-90 (1978); ALI Materials 1985, *supra* note 99, at 49-51 (concerning the "control problem").

150. See, e.g., *Van Arsdale v. Claxton*, 391 F. Supp. 538, 540 (S.D. Cal. 1975) (limited partner involved with operation of enterprise is no longer sheltered); *Delaney v. Fidelity*

define "control."<sup>151</sup> The RULPA retains the vague control test, but introduces a reliance factor as well.<sup>152</sup> Consequently, a lengthy factual inquiry may often be necessary. As with any rule emanating from ad hoc determinations of fact, inconsistencies will arise, even within the same jurisdiction. Since the tests differ, discrepancies between ULPA and RULPA jurisdictions would certainly arise as well. Because a court may raise the issue of jurisdiction sua sponte,<sup>153</sup> an appellate court that raises the issue may not have facts in the record on which to base a final determination, thereby necessitating remand and considerable delay. A certain amount of threshold litigation<sup>154</sup> is unavoidable, but a new jurisdictional standard, derived through manipulation of procedural rules, further burdens the courts without conferring a corresponding benefit.

Concern has been expressed that the often harsh result of a rule that includes all members for diversity purposes would discourage the formation of limited partnerships.<sup>155</sup> It is true that the limited partnership is a valuable vehicle for investors today, and its decline might have an adverse economic effect. The modern limited partnership, however, was "born" in 1822<sup>156</sup> and grew to be a significant feature of the business community in spite of the reign of the "persons composing" rule.<sup>157</sup> Of course, any possible negative effect the test may have had on the growth of the limited partnership cannot be measured accurately. Nevertheless, "it takes some imagination to believe that limited partnerships would be

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Lease Ltd., 526 S.W.2d 543, 545-46 (Tex. 1975) (limited partners controlling business as officers of sole corporate general partner were not insulated from liability).

151. ULPA § 7 provides that "[a] limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." U.L.P.A. § 7 (1916).

152. "[I]f the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control." R.U.L.P.A. § 303(a) (1976) (emphasis added).

153. See *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804).

154. In *Navarro*, Justice Blackmun's dissent troubled the majority because a case by case inquiry to identify the real parties in interest would present "serious difficulties [in determining] questions of diversity jurisdiction." *Navarro*, 446 U.S. at 464 n.13. The Court noted that "[i]t is of first importance to have a definition . . . [that] will not invite extensive threshold litigation over jurisdiction . . ." *Id.* (quoting the ALI Study of the Division of Jurisdiction between State and Federal Courts 128 (1969)).

155. See, e.g., *Limited Partners and Diversity*, *supra* note 19, at 315-16 (allowing limited partnerships a federal forum would promote commerce); 16 Duq. L. Rev. 221, 234 (1977-78) (denying federal forum deters formation of limited partnerships); 46 Geo. Wash. L. Rev. 657, 666 (1978) (applying traditional rule is likely to deter economic growth).

156. Limited partners are creatures of statute, with the first such law adopted by New York. See 1822 N.Y. Laws 259. See ALI Materials 1985, *supra* note 99, at 34-35 for a history of the limited partnership.

157. The rule began with *Chapman v. Barney*, 129 U.S. 677, 682 (1889) (citizenship of "all the members" determines diversity), and was most recently approved by the Supreme Court in *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980) (citing *Chapman* as rule for determining unincorporated associations' diversity status).

created in deliberate anticipation of a need for diversity jurisdiction."<sup>158</sup> It takes as much imagination to believe that a significant number of limited partnerships would not be created for fear of some future dispute in which they might be denied access to federal court.<sup>159</sup> A limited partnership may find itself as either plaintiff or defendant and, therefore, might wish to avoid federal jurisdiction as often as it might wish to seek it. It is ironic that in *Colonial Realty Corp. v. Bache & Co.*,<sup>160</sup> the seminal case excluding limited partners, the limited partnership argued in favor of the traditional rule requiring the citizenship of each member to be counted and that complete diversity was lacking.<sup>161</sup> Thus, providing a federal forum for limited partnerships does not justify manipulating a well established principle.

#### CONCLUSION

Neither the Federal Rules of Civil Procedure, nor the Supreme Court's treatment of unincorporated associations, nor the policies underlying diversity as a basis for federal jurisdiction support granting limited partnerships easier access to federal courts by considering only the citizenship of general partners. Moreover, diversity's depletion of the federal judiciary's resources without any corresponding benefit militates against manipulation of nonjurisdictional rules to achieve a jurisdictional result. The *Navarro* Court was wise to reaffirm the vitality of the "persons composing" rule, just as the *Bouligny* Court was prudent in declining to modify it, leaving any such decision in the hands of Congress.

*Hedwig M. Auletta*

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158. *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1265-66 (3d Cir. 1977) (Hunter, J., dissenting).

159. In an extensive list of relevant non-tax factors to be considered when deciding on an appropriate type of business form, the difficulty of access to federal court in a future diversity case was not mentioned in ALI Materials 1983, *supra* note 26, at 8-9.

160. 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966).

161. *Id.* at 183.

